

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>RAY K. KOUNTER</b>	)	
Claimant	)	
V.	)	
	)	Docket No. 1,064,099
<b>CESSNA AIRCRAFT COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>CESSNA AIRCRAFT COMPANY<sup>1</sup></b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requests review of the June 27, 2014, Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on October 22, 2014.

**APPEARANCES**

Gary K. Albin, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found claimant sustained an 8.5 percent permanent impairment of function to the right shoulder. Permanent partial disability benefits were awarded based on that finding. The ALJ provided equal weight to the ratings of Dr. Prohaska (12 percent to the right shoulder) and Dr. Babb (5 percent to the right shoulder). Claimant was also awarded future medical treatment upon application to the Director.

Respondent argues claimant's award should be based on the rating of Dr. Babb, the court-ordered neutral physician. Respondent further contends the ALJ erred in awarding future medical treatment.

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<sup>1</sup> Cessna is incorrectly listed in the caption as the "insurance carrier." It was stipulated on page four of the regular hearing transcript that respondent is self-insured. Also, there are references in the record to "Broadspire" as the carrier. Broadspire is a third party administrator, not an insurance company.

Claimant maintains the award should be based on Dr. Prohaska's rating, and that the ALJ correctly awarded future medical treatment.

The issues presented for the Board's consideration are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

While employed by respondent on July 24, 2012, claimant sustained personal injury by accident while operating a turret lathe. Claimant pulled back to rotate the turret when he heard a popping sound and felt weakness and pain in his right shoulder.

Claimant was treated for the injury primarily by Dr. Daniel J. Prohaska, a surgeon board certified in orthopedics and sports medicine. On August 3, 2012, a right shoulder MRI scan was conducted. According to Dr. Prohaska, the MRI revealed full-thickness tears of the supraspinatus and infraspinatus tendons; a partial-thickness tear of the subscapularis tendon; a right biceps tendon rupture; and chondromalacia of the glenohumeral joint. Dr. Prohaska diagnosed a "massive"<sup>2</sup> right rotator cuff tear, impingement syndrome, and acromioclavicular degenerative joint disease.

On September 26, 2012, Dr. Prohaska performed surgery, consisting of: (1) a right shoulder diagnostic arthroscopy; (2) an arthroscopic right rotator cuff repair; (3) an arthroscopic subacromial decompression; and (4) an arthroscopic distal clavicle excision. Dr. Prohaska provided post-surgical care over a period of several months and claimant was found to have achieved maximum medical improvement (MMI) on May 16, 2013. When claimant was last seen by Dr. Prohaska, he told the doctor he was doing 90 percent better, had no pain and was not experiencing any symptoms.<sup>3</sup> The doctor imposed no permanent restrictions.

Claimant testified he was happy with the results of his shoulder surgery.<sup>4</sup> According to claimant, he still had a little bit of pain once in a while in his shoulder, but was performing his regular job for respondent. Claimant denied having previous right shoulder injuries, medical treatment, or diagnostic testing.

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<sup>2</sup> Prohaska Depo., Ex. 2 at 1.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> R.H. Trans. at 10.

Dr. Prohaska testified claimant sustained a permanent functional impairment of 12 percent to the right shoulder pursuant to the *Guides*.<sup>5</sup> According to Dr. Prohaska, claimant will require no further treatment due to his accidental injury.

Dr. Prohaska testified his 12 percent rating consisted of 5 percent to the right shoulder for the distal clavicle excision and 7 percent to the right shoulder for the rotator cuff repair. The distal clavicle excision was necessary because of degenerative arthritis unrelated to the accident and the rotator cuff repair was necessary because of a combination of a preexisting degenerative tear and a traumatic extension of the tear caused by the work accident.

By order of the ALJ, claimant was evaluated by John R. Babb, M.D., on December 13, 2013. Dr. Babb noted claimant still had some right shoulder weakness, although his shoulder felt better since the surgery and he did not have pain or popping. Claimant could reach overhead without pain and could sleep on his right shoulder. He rated his pain as zero out of ten.

Dr. Babb found claimant did not appear to be in acute distress or discomfort and could change positions from the chair to the table without difficulty. Dr. Babb found no tenderness to palpation over the right shoulder joint, claimant's incisions were well healed, there were no signs of infection or fluctuance, and claimant's range of motion was normal. Impingement testing was negative. Dr. Babb diagnosed status post right shoulder arthroscopy with rotator cuff repair, subacromial decompression, and distal clavicle excision.

Dr. Babb rated claimant's permanent impairment of function pursuant to the *Guides* at 5 percent to the right shoulder. He imposed no permanent restrictions.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2012 Supp. 44-501b provides in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

“Burden of proof” means the burden of a party to persuade the trier of facts

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<sup>5</sup> AMA *Guides to the Evaluation of Permanent Impairment*, 4th Edition. All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>6</sup>

K.S.A. 2012 Supp. 44-510d provides in part:

...

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

...

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-508(u) provides:

"Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-510h(e) provides:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

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<sup>6</sup> K.S.A. 2012 Supp. 44-508(h).

The Board disagrees with the ALJ that equal weight should be accorded the 12 percent rating of Dr. Prohaska and the 5 percent rating of Dr. Babb. Under the circumstances of this claim, the preponderance of the credible evidence establishes claimant sustained permanent impairment of function as a consequence of the accidental injury of 7 percent to the right shoulder.

There is no dispute claimant sustained a compensable right shoulder injury by accident on July 24, 2012. There is likewise no dispute there are two medical opinions in the record regarding the extent of claimant's impairment.

The fallacy in the ALJ's rationale is that Dr. Prohaska's 12 percent rating includes impairment that is degenerative and not traumatic in nature. Dr. Prohaska testified he rated claimant's distal clavicle excision at 5 percent to the right shoulder and that the necessity for that part of claimant's surgical treatment was preexisting arthritis unrelated to the workplace injury. In Dr. Prohaska's opinion, claimant's large rotator cuff tear was partially degenerative, but the arthritic tear was extended by claimant's accident. The tear of the right rotator cuff was rated at 7 percent to the shoulder.

Dr. Babb's narrative report<sup>7</sup> does not discuss the components of his 5 percent rating. Hence, it is unclear the extent to which his rating is related to claimant's accidental injury as opposed to unrelated degenerative conditions. For this reason, the Award should be based solely on Dr. Prohaska's rating of 7 percent to the shoulder for the tear of the right rotator cuff.

When Dr. Prohaska found claimant at MMI, a presumption arose that respondent's obligation to provide medical treatment terminated. That presumption could be overcome by medical evidence establishing future medical treatment would, more probably true than not, be necessary. The Board disagrees with the ALJ that the presumption was overcome by medical evidence. Dr. Prohaska testified he did not believe claimant will require any further treatment due to this work related event.<sup>8</sup> Dr. Babb's report did not address the need for future medical treatment, thus rendering undisputed Dr. Prohaska's opinion regarding future treatment. Uncontradicted evidence, unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.<sup>9</sup> Claimant is not entitled to future medical treatment.

### **CONCLUSIONS**

1. As a result of the July 24, 2012, accidental injury, claimant sustained a permanent impairment of function of 7 percent to the right shoulder and is awarded permanent partial disability benefits based thereon.

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<sup>7</sup> Dr. Babb was not deposed.

<sup>8</sup> Prohaska Depo. at 42-43.

<sup>9</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

2. Claimant is not entitled to future medical treatment.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 27, 2014, is affirmed as modified.

Claimant is entitled to 0.71 weeks of temporary total disability benefits at the rate of \$570 per week, or \$404.70, followed by 15.70 weeks of permanent partial disability benefits at the rate of \$570 per week or \$8,949.00, for a total award of \$9,353.70, all of which is due and owing in one lump sum, less amounts previously paid. Future medical treatment is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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John D. Clark, Administrative Law Judge